UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COCA-COLA CONSOLIDATED, INC.

and

Cases 09–CA–250571
09–CA–251021

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT),
LOCAL UNION NO. 1199

Jonathan Duffey, Esq.,
for the General Counsel.
Noah Lipschultz and *Brooke Niedecken, Esqs.*,
for the Respondent.
Julie Ford, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts that in about September 2019, Coca-Cola Consolidated, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by unlawfully refusing to hire, or consider for hire, 20 union-represented applicants at a new automated warehouse that Respondent was opening in Erlanger, Kentucky. The General Counsel also asserts that in October 2019, Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the International Brotherhood of Teamsters (IBT), Local Union No. 1199 (Union) as the exclusive-collective bargaining representative of employees in the proposed bargaining unit at the Erlanger facility. For the reasons explained below, I have only determined that Respondent violated the Act by failing and refusing to recognize and bargain with the Union as alleged in the complaint. I recommend that the refusal to hire/consider for hire complaint allegation be dismissed.

STATEMENT OF THE CASE

This case was tried by videoconference on April 26–29, 2021.[1] The Union filed the charge in Case 09–CA–250571 on October 24, 2019, and filed the charge in Case 09–CA–251021 on November 1, 2019.[2] On April 2, 2021, the General Counsel issued a second amended consolidated complaint in which it alleged that Respondent violated Section 8(a)(3), (5) and (1) of the Act by: (a) in about early September 2019, refusing to consider for hire, or hire, twenty

[1] None of the parties objected to conducting the trial by videoconference. (Tr. 10.)
[2] All dates are in 2019, unless otherwise indicated.

applicants for employment because they engaged in union and protected concerted activities; and (b) since about October 14, 2019, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. Respondent filed a timely answer denying the alleged violations in the second amended consolidated complaint.

On April 21, 2021, Respondent filed a Motion to Dismiss or in the Alternative Stay Proceedings for Inability to Prosecute (Motion to Dismiss). In its motion, Respondent maintained that Acting General Counsel Peter Sung Ohr lacked the authority to carry out duties as General Counsel because his January 25, 2021 appointment to the position was unlawful (as was the President's January 20, 2021 decision to fire General Counsel Peter Robb). On April 26, 2021, the General Counsel filed a response in opposition to Respondent's Motion to Dismiss. Relying on its decision in *National Association of Broadcast Employees & Technicians – the Broadcasting & Cable Television Workers Sector of the CWA, AFL–CIO, Local 51 (NABET)*, 370 NLRB No. 114 (2021), the Board denied Respondent's Motion to Dismiss on May 5, 2021, explaining that even if the Board has jurisdiction to review the President's removal of the former General Counsel, it would not effectuate the policies of the Act for the Board to exercise that jurisdiction.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[3] I note that on April 26, 2021, I denied a similar motion that Respondent presented to me for consideration. (See Tr. 15–17.) On August 2, 2021, the General Counsel filed a letter brief to contend that the Board should rule on the merits of whether the President properly removed General Counsel Robb from his position. I decline to rule on that issue since I am bound to follow the Board's ruling in this case, as well as the Board's decision in *NABET*, 370 NLRB No. 114.

[4] The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 38, ll. 7, 10: "discriminates" should be "discriminatees"; p. 54, l. 12: "waist" should be "waste"; p. 149, ll. 14, 16: "Schemes" should be "Skeans"; p. 150, ll. 6, 23: "Schemes" should be "Skeans"; p. 190, ll. 6–7, 16: "Schemes" should be "Skeans"; p. 193, l. 10: "Schemes" should be "Skeans"; p. 342, l. 8: "Objection." should be "Objection overruled."; p. 352, l. 13: "roles" should be "rules"; p. 440, l. 24: "acumatic [sic]" should be "axiomatic"; p. 475, l. 18: "pull" should be "pool"; p. 492, l. 3: "IEELS" should be "i.e., ELS"; p. 498, ll. 2–3: "the mistakes and kind of take some" should be "them to take some kind of"; p. 618, l. 16: "August 16" should be "August 26"; p. 643, l. 9: "automatizations" should be "authorizations"; p. 648, l. 4: "offering" should be "offing"; p. 733, l. 4: "discriminates" should be "discriminatees"; p. 742, l. 10: "offering" should be "offing"; p. 772, l. 16: "Schemes" should be "Skeans"; p. 773, l. 2: "Schemes" should be "Skeans"; p. 780, l. 13: "Schemes" should be "Skeans"; p. 781, l. 17: Mr. Fore was the speaker; p. 837, l. 22: "Schemes" should be "Skeans"; p. 838, l. 5: "Schemes" should be "Skeans"; p. 840, ll. 7, 17: "Schemes" should be "Skeans"; and p. 843, l. 25: "28" should be "20".

Regarding exhibits, I note that on September 2, 2021, the court reporting service and General Counsel added a revised set of General Counsel exhibits to the electronic file for this case. I request that the Board's recordkeeping personnel take appropriate steps to ensure that the original set of General Counsel exhibits (placed in the electronic file on May 10, 2021) is not disclosed to the public, as that set of exhibits contains some personally identifiable information. I also make the following correction to the trial exhibits: the General Counsel did not offer GC Exhibit 40 into the evidentiary record (the exhibit file incorrectly states that the exhibit was offered, received and then withdrawn).

FINDINGS OF FACT[5]

I. JURISDICTION

Respondent, a corporation with a place of business in Erlanger, Kentucky, has been engaged in the business of warehousing and distributing beverages. During the 12–month period ending May 1, 2020, Respondent sold and shipped goods valued in excess of $50,000 from its Erlanger facility directly to points outside the Commonwealth of Kentucky. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background – the Duck Creek Road facility

1. Union representation

In about 2016, Respondent purchased the facility located at 5100 Duck Creek Road, Cincinnati, Ohio (Duck Creek) and, like its predecessor, recognized the Union as the sole collective-bargaining representative of the following bargaining unit at the facility:

> [A]ll employees employed at its 5100 Duck Creek Road location in the production, warehouse, fleet, plant maintenance operations, and building and grounds operations, but excluding checkers, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, special events employees, sign painters and sign shop employees, beverage analysts, automated guided vehicle technicians, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Company.

(See GC Exhs. 1(o) (par. 5), 2 (Art. 1), 27 (par. 3); see also Tr. 31–34, 413.) Consistent with that recognition, the Union and Respondent executed a collective-bargaining agreement that was effective from June 1, 2017 through May 31, 2021. (GC Exh. 2; Tr. 32–33.) Union president and principal officer Randall Verst has served as the Union's chief spokesperson throughout this time period and has been in that role since 2000. (Tr. 28.)

2. Duck Creek warehouse operations

The bargaining unit members working in Respondent's warehouse at Duck Creek (approximately 100–110 employees) were generally responsible for building/assembling beverage orders to be delivered to Respondent's customers such as grocery stores or restaurants.

[5] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

To accomplish this task, some employees worked as "pallet builders" who used "pallet jacks" (a machine that can lift and carry a pallet a few inches above the warehouse floor) to gather cases of beverages for a particular order. "Forklift operators," meanwhile, used forklifts load orders into delivery vehicles and also stock the warehouse with sufficient inventory from the production side of the facility and other facilities, while "truck pullers" moved trucks and trailers around the facility "yard." Respondent also employed (among other positions) mechanics to maintain equipment and "cleanup" employees to keep the warehouse clean. (GC Exhs. 2 (Art. 10), 27 (par. 4); Tr. 34–35, 49–55, 372–373, 386–387, 401–402, 578–580, 689–690; see also Tr. 53 (explaining that some forklift operators used a "Tygard" machine, which is a forklift capable of picking up beverage cases by layers instead of picking up an entire pallet).)

3. Disciplinary rules and policies

At the Duck Creek facility, Respondent used the following five categories when taking disciplinary action against bargaining unit employees: personal conduct; performance; attendance; build standard (for pallet building); and POD usage (employee compliance with using a kiosk to keep track of their work and breaks). Respondent followed a progressive discipline policy within each of the five categories, with potential disciplinary steps including a verbal warning, written warning, suspension and termination, though Respondent could skip some preliminary disciplinary steps for more serious infractions. Disciplinary action generally remained active for a rolling 12 months after the date that the disciplinary action was issued. Notably, infractions in separate categories did not affect each other, such that an employee with a written warning for performance could receive a verbal warning for a new attendance infraction (instead of receiving a suspension as the next step after the written warning).[6] (Jt. Exh. 1 (par. 6); GC Exh. 17; Tr. 117–119, 589–593, 767–768; see also GC Exh. 38 (examples of bargaining unit corrective action forms); R. Exh. 4 (Respondent's spreadsheet for keeping track of employee discipline); Tr. 595–599, 602–603 (discussing R. Exh. 4 and noting that Respondent would revise its tracking spreadsheet if an employee's discipline changed due to the grievance process), 767–768, 779 (noting that Respondent erroneously applied the disciplinary standard that the Union negotiated to not only bargaining unit employees but also nonunion employees at Duck Creek).)

Under Respondent's attendance policy at Duck Creek, bargaining unit employees accrued attendance "points" for any type of unapproved absence, tardy or early departure. Progressive discipline for attendance began when an employee accrued 7 points on a rolling 12–month calendar, with the following steps: 7 points–verbal warning; 8 points–written warning; 9 points–suspension and/or final warning; and 10+ points–termination. (GC Exhs. 17, 46; Tr. 117–118, 121–122, 374–375, 593–594; see also R. Exh. 17 (Respondent's forms for tracking employee attendance); Tr. 601–603 (discussing R. Exh. 17 and noting that Respondent would revise its tracking spreadsheet if an employee's discipline changed due to the grievance process).)

[6] As one exception to this rule of separate disciplinary categories, two suspensions in either the personal conduct or the performance categories would be grounds for termination under Respondent's disciplinary policy. (GC Exh. 17.)

4. Bargaining relationship

In the Union's view, its bargaining relationship and history with Respondent was somewhat difficult and strained. First, the Union believed that Respondent was strict with its disciplinary policies insofar as (in the Union's view) Respondent had a tendency to write up employees frequently for minor infractions that led the Union and bargaining unit members to file grievances to contest the discipline. Second, the Union filed 16 different unfair labor practice charges against Respondent (and Respondent's predecessor) from June 2015 through April 2019, with 12 of those charges being withdrawn or dismissed, and the remaining 4 charges being resolved via settlement.[7] Third, in 2016 and 2017, after Respondent acquired the Duck Creek facility, the Union raised concerns about errors in employee 401(k) balances and filed a grievance about how Respondent was handling maximum out of pocket calculations for the employee health care plan (the Union and Respondent eventually resolved those issues). And fourth, in April 2019, the Union filed an OSHA complaint against Respondent that led to an investigation and a "Citation and Notification of Penalty" that issued in July 2019.[8] (The Union filed an additional OSHA complaint in July 2019, but the evidentiary record does not show what happened with that particular complaint.) (GC Exhs. 3–5; Tr. 35–37, 40, 43–44, 47–48, 119–120, 122–123, 129–132, 168–169, 172–174, 176–177; see also Tr. 351.)

In about late 2018, Respondent's labor relations business partner Alan Hadam commented to the Union that he had to spend a lot of time responding to the various unfair labor practice charges that the Union filed. Similarly, in about 2018, Respondent's distribution manager Dave Boland remarked that if the Union didn't file so many grievances he could have half of his time back. Verst, meanwhile, made comments about having to file unfair labor practice charges because Respondent was not processing grievances, and about the Union spending a lot of time filing grievances because Respondent wrote employees up for a lot of infractions. (Tr. 43, 46–47, 175–176.)

There is no evidence that Boland, Hadam or any other managers who received/handled unfair labor practice charges, employee grievances and/or OSHA complaints at Duck Creek were involved in deciding who to hire when Respondent opened its new warehouse in Erlanger, Kentucky in September 2019. (Tr. 131, 157–158, 170, 452–454, 553–554; see also Findings of Fact, Section II(J)(2), infra (noting that warehouse manager Chris Cheney provided Duck Creek employee disciplinary information to director of talent acquisition Darlene Branham as part of the Erlanger hiring process).)

B. Summer 2018 – Respondent Announces Plans to Build a New Warehouse

On about June 28, 2018, Hadam contacted Verst and advised that Respondent was going to be issuing a press release about a new warehouse that Respondent was going to build in Erlanger, Kentucky (about 16 miles south of the Duck Creek facility). Later that summer,

[7] Although Respondent did not acquire the Duck Creek facility until 2016, Respondent retained the same managers as its predecessor at the facility. As previously noted, Verst served as the Union's president and principal officer throughout the same time period. (Tr. 28, 40–41, 132–133.)

[8] The evidentiary record does not establish whether Respondent contested the Citation and Notification of Penalty.

Boland told warehouse employees during staff meetings that the Duck Creek warehouse and distribution would be moving to Erlanger, and that the Duck Creek facility would no longer have any warehouse functions but would still have production and fleet operating. Boland indicated that the transition would be a smooth one and some employees left the meetings with the impression that the jobs of Duck Creek warehouse employees would simply move over to Erlanger.[9] (Tr. 55–56, 330–332, 361–363, 396, 413–414, 604–606.)

C. February 8, 2019 Meeting to Discuss the New Facility in Erlanger

After a few unsuccessful attempts, the Union and Respondent met on February 8, 2019 to discuss issues related to the new warehouse in Erlanger. Hadam indicated that Respondent was not in a position to answer any specific questions but wanted to write down any questions that the Union had and present them to Respondent's corporate human resources department (located in Charlotte, North Carolina). Verst followed up with Hadam after the meeting, but the process was slow because the Erlanger opening date was pushed back to later in the year due to a problem with construction. (Tr. 56–59.)

D. July 18, 2019 Meeting to Discuss the Erlanger Facility

On July 18, 2019, the Union and Respondent met again to discuss the new Erlanger facility. At the beginning of the meeting, Respondent's counsel advised the Union that the warehouse at Erlanger would be much larger than the warehouse at Duck Creek and would also be automated. Regarding automation, Respondent's counsel explained that a machine connected to various conveyor belts (the Vertique system) would assemble and package beverage orders. Due to the automation, Respondent estimated that it would need approximately 50 fewer employees to work in the Erlanger warehouse. (Tr. 59–62, 64–65, 397–398, 415–419; see also Tr. 415–416 (noting that instead of Hadam and Boland, Respondent had its counsel attend the July 18 meeting, along with vice president of employee and labor relations Melissa Eblen, and senior director of automation Janko Mandakovic.)

After Mandakovic described how the Vertique system would operate, Respondent's counsel stated that Duck Creek employees would have to apply for positions in the Erlanger facility. The Union representatives at the meeting objected, asserting that warehouse employees in the Duck Creek bargaining unit should simply follow the work over to Erlanger and continue working under the same collective-bargaining agreement. Respondent's counsel disagreed, asserting that the collective-bargaining agreement only applied to the Duck Creek facility, but acknowledging that the Union and Respondent would need to bargain about how the transition to the new Erlanger facility would proceed.[10] (Tr. 62–65, 398–399.)

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[9] Union steward and forklift operator Andrew McIntire testified that warehouse manager Chris Cheney also stated that Duck Creek warehouse employees would simply move over to the Erlanger facility when it opened. Cheney, however, denies making such a statement. (Compare Tr. 396–397, 414 with Tr. 606–607.) I need to resolve this disagreement because it is not material to my analysis.

[10] The parties agree that the question of whether the Duck Creek collective-bargaining agreement should apply at the Erlanger facility has been litigated and resulted in a finding that Respondent was not obligated to implement the terms of the collective-bargaining agreement at Erlanger. (Tr. 67–68.)

E. Respondent Notifies Employees about Erlanger Warehouse

In summer 2019, plant manager Coresa Ford announced to Duck Creek warehouse employees that they would not have a job unless they applied and were hired to work at the Erlanger facility. (Tr. 332–333, 364–365, 399–400.) On about July 22, 2019, Respondent also sent a letter to Duck Creek warehouse employees that stated as follows:

> As you know, we have recently communicated with the union and our teammates some additional details surrounding our planned relocation of warehouse operations from Duck Creek to Erlanger, which had been announced approximately a year ago. It was important for us to follow up in writing so you receive accurate and up to date information about this process. . . .
>
> The warehouse operations in Erlanger will be significantly different than the operations in Duck Creek. First, it will not be a combined production-distribution center. Instead, production operations will remain in Duck Creek. Second, the warehouse will be highly automated, which means there will be fewer warehouse positions. In addition, many of the warehouse jobs in Erlanger will be different because of the change in the nature of operations, and some warehouse positions that exist today at Duck Creek will not exist at Erlanger because of the nature of the operations there. Although we do not have exact numbers yet, we expect approximately 50 fewer warehouse-[dedicated] positions in Erlanger than there are today in Duck Creek. We advised the union, as well as warehouse supervisors, that given these various differences, individuals (whether they are union employees, supervisors, or other non-union employees) who are interested in working at Erlanger are welcome to apply for positions at Erlanger. We will follow our normal hiring procedures, and hire based on qualifications.
>
> We will be in close communication with you and the union regarding the hiring process and timing, and will plan to hold an informational event at Duck Creek to ensure that employees have timely information should they wish to apply.
>
> We will continue to communicate with the union and our teammates as we work through matters related to the transition in the coming weeks. We know this is a challenging period for our teammates as you learn how the business transition will affect you personally, and we do not take this lightly. Please reach out to your leadership with any questions and we will do our best to get you information as it becomes available. . . .

(GC Exh. 6; Tr. 66.)

In around the same time period, an unidentified shift supervisor fielded a question from an employee during a daily meeting about whether employees' disciplinary records would follow them to Erlanger. The shift supervisor replied that employee disciplinary records would not follow them to Erlanger (i.e., employees taking jobs at Erlanger would start over with a clean disciplinary record). (Tr. 333–334, 349–350, 366–367; see also Tr. 369 (employee observed that when he began working at Erlanger his disciplinary record was wiped clean).[11]

[11] Witness Lemarco Branham testified that he understood the employee's question as asking whether

July 26, 2019 Meeting to Discuss the Erlanger Facility

On July 23, the Union sent a letter to Respondent to (among other things) object to Respondent's plan to require Duck Creek employees to apply for jobs at Erlanger and assert that Respondent needed to bargain over the details of the planned relocation. On July 25, the Union sent a letter to Respondent to request information about, but not limited to: the approximate number of employees expected to work at Erlanger; job descriptions for warehouse jobs at Duck Creek and Erlanger; wages and benefits to be offered for Erlanger warehouse positions; labor costs at Erlanger; and whether work was being transferred to Erlanger from any other facilities besides the Duck Creek facility. (GC Exhs. 7–8; Tr. 67, 80.)

When the Union and Respondent met on July 26, they began by reiterating their positions on whether the Duck Creek contract should apply at Erlanger. After agreeing to reserve their positions on that issue, the Union and Respondent next turned their attentions to bargaining over the effects that the transition to Erlanger would have on Duck Creek warehouse employees. On that point, the parties noted that around 18–20 Duck Creek warehouse jobs would still be retained because they related to functions at Duck Creek that would continue even after the warehouse closed (e.g., truck puller, can crusher, recycling). The parties proposed to reclassify those positions as part of the Duck Creek production department, and then allow bargaining unit members to bid for those positions based on seniority. Respondent also provided a document indicating that Erlanger would need 54 employees in non-managerial, non-administrative positions,[12] a headcount that was significantly lower than in the Duck Creek warehouse. (Tr. 70–76, 481–482, 523; GC Exh. 10; R. Exh. 6; see also GC Exh. 9 (p. 18) (updated staffing headcount that Respondent provided to the Union on August 3 in response to the Union's July 25 information request); Tr. 484–486 (explaining that GC Exh. 10 provided additional comments about the job duties for some Erlanger positions).)

F. August 2, 2019: Job Posting for Erlanger

On August 2, Respondent prepared a job posting to go out to Duck Creek employees about job openings at Erlanger. Later in the afternoon, however, Respondent modified the job posting to emphasize that it would consider employee qualifications, performance and attendance

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employee disciplinary records at Duck Creek would affect their ability to be hired at Erlanger, and further understood the shift supervisor to be answering "no" to that question (i.e., Duck Creek disciplinary records would not affect an employee's ability to be hired at Erlanger). (See Tr. 334, 367–368.) While I found Lemarco Branham to generally be a credible witness, I am not able to credit this aspect of his testimony due to the lack of specificity about when the conversation occurred and which employee and shift supervisor were involved in the discussion. In addition, I do not have a basis to find that the shift supervisor was in a position to make reliable statements about how Respondent would consider Duck Creek disciplinary records when making hiring decisions for jobs at Erlanger.

[12] The specific non-administrative, non-supervisory positions at this point were: hand stack material handler (4 employees); laborer (4); logistics operator I (20); logistics operator II (4); material handler (20); and mechanic manufacturing II (2). (GC Exh. 10; see also R. Exh. 6.) Later, in September 2019, Respondent clarified that the 54 non-administrative, non-supervisory positions at Erlanger would be: hand stack material handler (4 employees); laborer (4); logistics operator I (4); logistics operator II (1); logistics operator III (17); logistics operator IV (2); material handler (20); and Vertique mechanic (2). (GC Exh. 12; see also Tr. 99–102.)

in its Erlanger hiring decisions. Hadam emailed Verst to explain the rationale for Respondent's concerns about employee performance, stating as follows:

> Due to some serious performance issues in the warehouse we have revised the posting to note that current employees applying for positions in Erlanger will be given consideration based on qualifications, performance (i.e., ELS)[13] and attendance. Yesterday we had 36 call offs and left earlies between the 3 shifts. We averaged 1300 cases per shift vs. the normal 2400 cases and we saw 80 cases per hour vs. 175–190 per hour. It would be in our employees best interest, especially if they want to be considered for a position in Erlanger, to hear from you that they need to perform up to the standard and to report to work as scheduled. Separate and apart from this, we believe that this implicates the CBA's No Strike clause. Please understand that the Company will pursue all appropriate remedies based on any breach of that contractual provision.

(GC Exh. 19; Tr. 114–115, 179–181, 541–542, 586–587; see also 123, 185–188, Tr. 538 (noting the Union's concern that employee fatigue and absenteeism might be higher in summer 2019, because warehouse employees were working long hours and were also facing the possibility of unemployment due to the Duck Creek warehouse closing).)[14]

Respondent also proceeded with its revised job posting, which stated as follows, in pertinent part:

> IMPORTANT INFORMATION REGARDING THE WAREHOUSE RELOCATION TO ERLANGER, KY
>
> As it has been previously communicated to Local 1199, all employees interested in working in Erlanger, including bargaining unit, non-bargaining unit, and management teammates will have an opportunity to apply for positions at the new warehouse facility via the "My Career" site. *Consideration will be given to qualifications, performance (i.e., ELS), and attendance.*
>
> Although we are starting to post management positions at this time, most positions will be posted on-line on or around August 16, 2019.
>
> At the present time, no Erlanger warehouse positions have been filled.

[13] ELS stands for Engineered Labor Standards and is a set of metrics for employee performance and productivity in certain warehouse jobs at Duck Creek. The ELS metrics relate to the rate at which employees handle beverage cases when building orders. (Tr. 115–116, 350–351, 381, 775–776.)

[14] The Union and Respondent did not agree on how to address the issue of long work hours and employee fatigue at Duck Creek, as the Union suggested that Respondent use seasonal workers while Respondent wished to bring in temporary employees (notwithstanding a memorandum of understanding that prohibited using temporary employees). Ultimately, Respondent brought in temporary employees in August/September 2019, without first reaching an agreement with the Union. (Tr. 195–197, 543–544, 587–588, 700–702; GC Exh. 2 (p. 36).)

> Members of the Talent Acquisition Team will be onsite when the jobs are posted to assist you in applying on the CONA "My Career" site. We will post further details as soon as we have confirmed date(s) and time(s). . . .

(GC Exh. 19 (p. 4) (emphasis in original); Tr. 490–493, 609–611.)

G. August 12–13, 2019: Additional Meetings to Discuss the Erlanger Facility

On August 12 and 13, Respondent and the Union participated in additional meetings about the opening of the Erlanger warehouse. Since the wage rates for most Erlanger positions were going to be lower than at Duck Creek, the parties discussed "grandfathering" any higher wage rates for Duck Creek bargaining unit employees who accepted offers to work in similar roles at Erlanger (with the exception of the material handler position at Erlanger, for which Respondent did not want to grandfather any wages because Respondent viewed that job as a lower skilled job). The parties also discussed: the possibility of severance packages for employees who left the company; the process for employees who wound up without a position at either Duck Creek or Erlanger; and the bidding process that would apply to the approximately 20 warehouse jobs at Duck Creek that would become part of the production department. Respondent also acknowledged that if it hired a sufficient number of bargaining unit members at Erlanger then Respondent would recognize its duty to bargain with the Union at that facility. (Tr. 89–95, 141–142, 159–160, 421; GC Exh. 2 (Art. 10) (wage rates and job classification rate codes at Duck Creek); GC Exh. 11 (wage rates at Erlanger).)

H. August 2019: Respondent Begins Hiring for Jobs at the Erlanger Facility

1. Employee eligibility requirements

Under Respondent's established policy (as revised in 2007), internal applicants need to meet the following criteria to be eligible for an open position:

1. Internal candidates must receive an endorsement from their immediate supervisor or manager.

2. Internal candidates must be in good standing. Employees on disciplinary probation (Step 3 [of progressive discipline]) are not eligible for consideration.[15]

3. All internal candidates must be in their current position for at least six (6) months. Exceptions may be approved as needed to help us meet our business objectives. Human Resources, the hiring manager and the employee's supervisor must approve any exceptions.

[15] The "Step 3" referenced here comes from Respondent's corrective action policy, which differs from the discipline policy that applied at Duck Creek. (Compare GC Exh. 17 (Duck Creek discipline policy) with R. Exh. 14 (corrective action policy); see also Tr. 471, 532–533, 767–770.)

4. Employees may only apply for one posted position at a time. Only after a final decision has been made regarding their status as a candidate can the employee post for another position.

5. Candidates that best match the requirements for the position will be invited to participate in the interview process.

(GC Exh. 23; see also R. Exh. 1 (example of an endorsement form); Tr. 464–467, 470, 531–532, 554–555, 557, 573.)

For hiring at Erlanger, Respondent waived four of these criteria, such that internal applicants: did not need to obtain an endorsement from their supervisor/manager (criterion 1); did not need to have been in their current position for at least six months (criterion 2); could simultaneously apply for multiple positions at Erlanger (criterion 4); and could interview immediately after submitting their application (i.e., Respondent did not eliminate any internal applicants before the interview stage) (criterion 5). Respondent did not waive the good standing requirement described in criterion 3, but did not evaluate good standing until after the applicants submitted their applications and completed their job interviews. (Tr. 465–466, 473–475, 565–566–567, 572; R. Exh. 2 (Erlanger job posting advising internal applicants that they would not need an endorsement form).)

2. August 14 – recruiting begins for internal candidates

On about August 14, Respondent posted job openings at Erlanger, but did so only for internal applicants (from Duck Creek or another one of Respondent's facilities) to give them the first opportunity to be hired for the positions. Respondent also advised employees that they could apply for positions on the "My Career" website or apply during an upcoming hiring event when Respondent would have staff available at Duck Creek to assist with the application process and conduct interviews. (Tr. 137–138, 334–335, 378, 457, 460–462, 558–559, 561–562, 566, 607–609; R. Exhs. 2–3; see also Tr. 458 (noting that Respondent solicited both internal and external applicants for mechanic positions on about August 14 because the mechanic position can be difficult to fill).)

From August 20–22, Respondent held its hiring event at Duck Creek to assist with applications and interview internal applicants who were interested in working at Erlanger. Respondent also interviewed some internal applicants outside of this timeframe (for example, employees who applied after the hiring event).[16] Respondent did not disqualify any internal applicants based on their interviews. (Tr. 335–337, 369–370, 376–377, 400–401, 459–460, 463, 558–561, 563–565, 754; R. Exh. 3.)

[16] Witness Lemarco Branham testified that during his interview with an unidentified employee from Charlotte, NC, the interviewer told Branham that Erlanger would be a nonunion facility. (Tr. 335–337, 369–372; see also Tr. 563, 609 (noting that Respondent used a variety of personnel to conduct interviews, including personnel from out of town who had worked in automated warehouses, but did not use any Duck Creek warehouse supervisors to conduct interviews).) I have given little weight to this testimony because the evidentiary record does not establish the interviewer's role with Respondent or the interviewer's ability to make representations (e.g., as an agent or supervisor) about unionization at Erlanger that should be imputed to Respondent.

3. August 26 – recruiting begins for external candidates

On about August 26, Respondent began accepting applications from external candidates who sought jobs Erlanger. In assessing external candidates, Respondent did not conduct reference checks or inquire into their disciplinary history with prior employers because it did not believe it received helpful information from prior employers about those issues. Respondent did, however, review each candidate's work history and interview desirable candidates. (Tr. 218, 458, 555–558; Jt. Exh. 1 (par. 10); GC Exh 26 (example of information provided by an external candidate on their application to work at Erlanger).)

I. August/September 2019: Respondent Eliminates Some Internal Applicants for Erlanger Jobs Based on Disciplinary History

1. Respondent's corrective action policy

For its non-bargaining unit employees, Respondent follows a corrective action policy that differs from the progressive discipline policy at Duck Creek. Under Respondent's corrective action policy, discipline proceeds in the following steps:

> Step 1: Initial Notice: Written communication to clarify expectations of acceptable conduct and advising of consequences if the conduct is not corrected.
>
> Step 2: Second Notice: Additional written communication stating that either the conduct addressed in Step 1 or other misconduct is unacceptable and advising of consequences if conduct is not corrected.
>
> Step 3: Final Notice: Written communication describing the conduct in need of immediate and sustained improvement and that continuation of any unacceptable conduct for the same or different reason may result in termination of employment. An employee will remain at Step 3 until a step is removed in the rolling 12 months or for a minimum of 90 days, whichever is greater.
>
> Step 4: Discharge: Written documentation that may be given to the employee of the decision terminate employment.

(R. Exh. 14; Tr. 471, 522.) Respondent may skip steps in the corrective action process depending on the nature and severity of the conduct, and corrective action steps remain active for a rolling 12 months from the date of issue. (R. Exh. 14.)

2. Respondent uses its corrective action policy to eliminate internal applicants for positions at Erlanger

As part of the hiring process for jobs at Erlanger, Respondent evaluated employee good standing in part by looking at their disciplinary record. Instead of using the disciplinary framework that applied at Duck Creek (with five separate categories of discipline that generally did not affect each other), Respondent sought to evaluate whether internal applicants had discipline that was at or equivalent to step 3 under Respondent's corrective action policy. For

bargaining unit members at Duck Creek, Respondent made this assessment by combining any disciplines from the separate categories. Thus (for example), if an applicant had a verbal warning in one category and a written warning in another category, those combined warnings counted as a "step 3 equivalent" level of discipline and Respondent rejected the applicant on that basis. (Jt. Exh. 1 (pars. 6–8); Tr. 467–473 (noting that Eblen, in about spring 2019 and in conjunction with human resources and in-house counsel, made the decision to use the step 3 equivalent standard as a basis for disqualifying internal applicants for positions at Erlanger).)

On about August 26, 2019, Respondent began reviewing disciplinary records to determine which internal applicants (from Duck Creek and other facilities) had step 3 or step 3 equivalent discipline. Duck Creek warehouse manager Chris Cheney took the lead on gathering disciplinary records for Duck Creek employees, which he then provided to director of talent acquisition Darlene Branham[17] for review. After some back and forth to pin down relevant and active discipline, Respondent disqualified the following internal applicants (and Duck Creek bargaining unit members) because they had a step 3 equivalent level of discipline in the 12 months leading up to August 26, 2019:

Manny Castillo
Kenny Cunningham
Chris Downs
David Gonzalez
Tyrell Holmes
Robert Lawall
Donald Lawson
Troy Mallery
Cordery Martin
Cardero McCurdy
Jeff McFarland
Kenny McGuire
Hector Montero
DeAngelo Pankey
Marcus Pearl
Brandon Roaden
David Shavers
Chris Valentine
D'Andre Williams
Kazzlen Wright

(GC Exh. 22; R. Exh. 20 (p. 83) (showing that Respondent evaluated the disciplinary records of internal applicants in both bargaining unit and non-bargaining unit positions); Tr. 126–127, 212–213, 215–216, 222–223, 474–476, 567–571, 574, 611–612, 615–627, 691–693, 698–700, 705–708, 737–738, 750–765, 770–775; see also GC Exh. 38 (disciplinary records in the 20 alleged discriminatees' files when Respondent considered them for hire at Erlanger); R. Exhs. 17 (attendance tracking records that Cheney reviewed for the 20 alleged discriminatees), 20 (emails and disciplinary records shared between Cheney and Darlene Branham while evaluating which

[17] There is no relation between witnesses Lemarco Branham and Darlene Branham. (Tr. 571–572.)

internal applicants had a step 3 or step 3 equivalent level of discipline); Tr. 245 (discussing GC Exh. 38).)

There is no evidence that Respondent informed the Union or Duck Creek bargaining unit members in advance that Respondent would be using disciplinary records and the "step 3 equivalent" framework to disqualify internal applicants for jobs at Erlanger. (Tr. 123–124, 521–522, 533–536.)

J. Late August 2019: Employees "Bump" into Duck Creek Production Positions

Under an agreement reached between Respondent and the Union, Respondent agreed to fill the approximately 20 new positions in the Duck Creek production department by August 19 (the new positions were previously classified as warehouse jobs and would continue at Duck Creek, but classified as production jobs). Next, as specified in the agreement, Respondent contacted each Duck Creek bargaining unit employee in order of seniority to determine if the employee wished to exercise his or her bumping rights under the collective-bargaining agreement to obtain one of the production positions. Employees who wound up without jobs in the production department after the bumping process (primarily more junior employees) would not have positions at the Duck Creek facility but could be recalled through the layoff process and/or seek employment at Erlanger. (GC Exhs. 20, 27 (par. 5); Tr. 96, 421; see also GC Exh. 2 (Art. 9, Sec. 3(a)), 9 (pp. 49–59) (seniority lists for the entire bargaining unit and for bargaining unit employees within the warehouse and production departments); Tr. 87–88.)

K. Early to Mid–September 2019: Respondent Makes Job Offers for Erlanger

In around early or mid–September, Respondent offered positions to individuals who applied to work at Erlanger. Respondent offered positions at Erlanger to 38 bargaining unit members at Duck Creek, 25 of whom accepted.[18] At least 6 of the 38 bargaining unit members who received offers had previously filed grievances and/or held official roles with the union (such as serving on the negotiating committee or as a union officer). As previously noted, Respondent did not offer positions to the 20 alleged discriminatees because it disqualified them for having step 3 equivalent levels of discipline. Respondent disqualified an additional 11 bargaining unit members from receiving Erlanger positions because those 11 individuals were terminated from Duck Creek before the Erlanger facility opened (9 of those 11 were terminated before Erlanger offers went out). Eight bargaining unit members were disqualified because they did not complete the application process (generally by not completing an interview). (R. Exh. 8; Tr. 147–150, 154–155, 384, 400–401, 486–490, 603–604, 764–765, 837–838, 840; see also GC Exhs. 13, 27 (par. 8).)

When Lemarco Branham received his offer to work at Erlanger, the individual (name: Janko) who gave Branham his offer letter advised that Branham would be coming in as a "logistics operator 3" (essentially, a forklift operator) at the same pay rate as what Branham

[18] Of the 25 bargaining unit members who accepted positions at Erlanger, 2 accepted "material handler lead" positions. Respondent maintains that the material handler lead position is a supervisory position. (R. Exh. 8; Tr. 488.)

earned at Duck Creek. Janko also stated Erlanger would be a nonunion facility.[19] (Tr. 337–339, 377–379.)

L. September 12, 2019: Respondent and the Union Execute an Agreement on the Effects of Relocating of Warehouse Operations from Duck Creek to Erlanger

On September 12, 2019, Respondent and the Union executed an effects bargaining agreement that addressed issues related to relocating the Duck Creek warehouse operations to Erlanger. For Duck Creek bargaining unit employees who were hired for and accepted positions at Erlanger, the agreement established that Respondent would: (a) recognize their years of service for purposes of benefits (such as paid time off); (b) "grandfather" wage rates for employees who were hired into laborer, logistics operator, hand stack material handler, and mechanic positions at Erlanger (but not for employees who were hired as material handlers); and (c) pay a lump sum payment ($750 for an individual plus one; $1350 for a family) into employee HRA or HSA accounts if the employee enrolled in Erlanger healthcare benefits. The agreement also (among other things) provided for severance payments to bargaining unit members whose employment with Respondent ended due solely to the Erlanger relocation, and a "stay bonus" for employees who moved into production positions at Duck Creek. (GC Exh. 21; Tr. 95–99, 143–147, 159–160, 476–481, 538–540, 543.)

M. September 25, 2019: Respondent Plans to Have Temporary Employees Supplement Staffing at Erlanger

On September 25, Cheney contacted Crown Services, a staffing company, to request temporary employees to work at Erlanger starting on September 30, 2019, when Erlanger was scheduled to open. Crown Services and Respondent had an existing relationship and agreement, as Crown Services provided temporary employees who worked at the Duck Creek facility, and also provided temporary employees who worked at Erlanger in September 2019 to assist with setting up the facility. (Tr. 220, 247–248, 250–253, 285–286, 305–306; GC Exhs. 28, 29 (p. 5); see also GC Exhs. 29 (pp. 2–4) (Respondent's staffing requests for temporary employees to assist with setting up Erlanger), 30, 35.)

N. September 29/30, 2019: Respondent Ends Operations at the Duck Creek Warehouse and Begins Operations at Erlanger

1. Duck Creek warehouse operations end and Erlanger opens

On September 29, 2019, Respondent had its last day of normal warehouse distribution operations at Duck Creek and laid off all warehouse employees who did not bump into a position in the Duck Creek production department or receive and accept a position at Erlanger. On September 30/October 1 (described as the "Go Live" point), Respondent began warehouse

[19] I have credited Branham's testimony about this discussion because Branham provided enough detail for me to infer that he spoke with Janko Mandakovic, who was involved with Respondent's preparations to open the Erlanger facility. I also note that Branham's testimony about the discussion was not rebutted.

operations at Erlanger, with the facility operating 24 hours daily (except for holidays) and serving all customers that Respondent previously handled at Duck Creek. This direct transition without reducing order processing was by design, as Respondent did not wish its customers to be impacted (e.g., by not being able to obtain a similar amount of beverages) by the transition from Duck Creek to Erlanger. (Jt. Exh. 1 (pars. 1–4); Tr. 108–109, 162–163, 194–195, 340–341, 348–349, 388, 395, 401, 586, 804–806, 822–824; see also R. Exh. 10 (Respondent's customer spreadsheet).)

2. Erlanger warehouse operations

The warehouse operations at Erlanger differ somewhat from those at Duck Creek, primarily because Erlanger automates much of the pallet building process. At Erlanger, material handlers work in designated areas stocked with certain types of beverages, and primarily are responsible for loading cases of beverages onto a conveyor belt based on instructions that appear on a video monitor. Using the beverages on the conveyor belt, the Vertique system builds pallets of beverages for shipping to customers. Hand stack material handlers then top off machine-built pallets with specific beverages needed to complete customer orders. Logistics operators facilitate the process by (among other duties) using forklifts and other equipment to load and unload beverage trucks and restock the material handler work areas, while mechanics maintain the Vertique system machinery. (GC Exh. 9 (pp. 2, 4–17); Tr. 342–346, 372–373, 387, 578–583, 690; see also Tr. 793–796 (describing operations in an automated standalone warehouse).)

3. Erlanger staffing

Upon opening, Respondent discovered that it underestimated its staffing needs at Erlanger. Specifically, instead of needing 54 employees at Erlanger in non-managerial, non-administrative positions, Respondent estimated that it now needed 81 employees in those positions. Part of the problem was that the employees were undertrained and inexperienced in their new jobs in the automated Erlanger warehouse. In addition, due to a new promotion starting on around September 30, one customer placed a much larger beverage order than Respondent expected. As a result of these and other factors, employees had trouble meeting the productivity goals that Respondent expected, and warehouse operations were chaotic in the days shortly after the Erlanger facility opened. Respondent decided against asking additional Duck Creek bargaining unit members if they might be interested in taking a position at Erlanger, and also did not cut back on order processing because Respondent was committed to taking care of its customers and their orders. (Tr. 495–503, 520–522, 525–526, 528–529, 667–670, 694–696, 806–816, 823–825; R. Exh. 6.)

To supplement its staffing (based on both its original and revised staffing models), Respondent asked Crown Services to provide several temporary employees to fill various non-supervisory/non-administrative warehouse positions at Erlanger. Crown Services' hiring criteria for potential temporary employees (as directed by Respondent) were limited, as Crown Services required a criminal background check and drug screen but did not inquire into disciplinary histories, check references of previous employers, or evaluate whether candidates had experience using forklifts or working in a warehouse. Respondent did retain the right to dismiss any temporary employees who did not meet its standards. Turnover among temporary employees (due to attrition, failing to meet Respondent's standards, or for other reasons) was common. (Jt.

Exh. 1 (pars. 11–12); R. Exhs. 6, 16 (p. 1); GC Exhs. 29 (pp. 9–10, 12–15, 20–24, 27, 29), 30–32, 35, 43 (pp. 1, 4); Tr. 267–275, 290–295, 298, 301, 304–307, 316–318, 346, 358, 501–502, 670–673, 711–713; see also Tr. 670–672, 675–676 (noting that while Respondent hires external candidates at Erlanger, it also uses a temp-to-hire framework to train temporary employees and potentially hire them as permanent employees after they work at least 540 hours); Tr. 321 (indicating that if a temporary employee has worked at least 520 hours, Crown Services did not impose a fee/penalty if Respondent subsequently hired that employee as a permanent employee).)

Although Respondent readily used temporary employees at Erlanger, Respondent retained the option to reject former employees who sought to work at Erlanger as temporary employees. In October 2019, Cheney advised Crown Services that Respondent would not permit alleged discriminatees Cardero McCurdy and Tyrell Holmes to work at Erlanger as temporary employees. Cheney did not provide a rationale for Respondent's decision other than to state that he was following instructions from Respondent's human resources department. (GC Exhs. 32–34; Tr. 276–277, 295–296, 307–309, 312, 323, 631–632; see also Tr. 323–324 (noting that Crown Services has a standard practice of asking employers if they will accept former employees as temporary employees).)

O. October 2019: The Union Requests Recognition and Bargaining at Erlanger

1. October 3: the Union requests recognition and bargaining

On October 3, the Union (through Verst) sent a letter to Respondent to demand recognition and bargaining at Erlanger. Verst stated as follows in his letter:

> Local 1199 has reviewed the information provided by the Company last week regarding the staffing at the new Erlanger Distribution Center.[20] It appears from that material that, at least as of that date and presumably as of this week's opening of the facility, [Respondent] has permanently filled 33 positions that clearly would be considered non-supervisory, union-eligible classifications. These are in the jobs of hand stack material handler, laborer, logistics operator I–IV, material handler and Vertique mechanic. (The Union reserves the right to dispute the claimed supervisory status of other job classifications.) Of those hires, 23 came from the existing, Union-represented bargaining unit at Duck Creek.
>
> Although [Respondent] indicates it still has openings left to fill on a permanent basis at Erlanger, the 33 jobs filled to date would seem to be a representative complement of the total to be hired there. Since a majority of the workers hired into those positions came from the existing Local 1199 bargaining unit, and since under law it must be presumed that they continue to support the Union, the Company is required to recognize and bargain with Local 1199 as the bargaining representative for Erlanger employees. Please note that this demand for recognition specifically is made without prejudice to the

[20] Respondent provided information to the Union in connection with an (unsuccessful) injunction proceeding on September 24, 2019. (Tr. 99–102, 104–108, 164–166; GC Exhs. 12–13, 27.)

> Union's position that the Erlanger facility is and must be covered by the existing collective bargaining agreement that applies at Duck Creek Road. . . .

(GC Exh. 14; Tr. 110–111, 164–167.)

2. October 23: Respondent replies to the Union's request for recognition and bargaining

On October 23, Respondent's attorney sent a letter to the Union in response to the demand for recognition and bargaining, stating as follows:

> We are in receipt of the Union's letter dated October 3, 2019, in which Teamsters Local 1199 requests recognition with respect to certain classifications of employees at the Company's Erlanger, Kentucky facility. The letter asserts that the Union has the support of a majority of employees in the classifications outlined, based on information the Company provided regarding the anticipated staffing numbers, prior to Erlanger becoming operational.
>
> The Company believes the Union's request is premature, and that the Union does not have the required majority status, and therefore the Company declines to recognize the Union. The initial staffing information the Company shared in September was based on incorrect staffing and operational assumptions and Erlanger is not currently operating in a normal or substantially normal fashion.
>
> As we have communicated all along, we intend to follow our legal obligations with regard to recognition rights at Erlanger, but due consideration must be given to the status of operations there, as well as the Section 7 rights of individuals over whom the Union asserts representational rights.

(GC Exh. 15; Tr. 111, 134–135, 167, 506–507.) The next day, the Union filed an unfair labor practice charge regarding Respondent's refusal to recognize and bargain with the Union at Erlanger. (Tr. 167; GC Exh. 1(a).)

3. Erlanger staffing levels as of October 15

The parties in this case have stipulated that if Respondent is obligated to recognize and bargain with the Union at Erlanger, the following would constitute an appropriate bargaining unit under the Act:

> All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

(Jt. Exh. 1 (par. 15).)

As of October 15, 2019, roughly the date on which the General Counsel maintains that the Union was entitled to recognition at Erlanger, Respondent employed 30 non-supervisory, non-administrative employees at Erlanger in positions in the proposed bargaining unit. Of those 30 employees, 23 were members of the bargaining unit at Duck Creek before starting work at Erlanger (1 employee [employee Q.D.] was an internal, nonunion candidate, while the remaining 6 employees were external candidates). The following chart illustrates how Respondent's staffing looked in proposed bargaining unit positions at Erlanger:

Job Title	**Former Duck Creek Employees in Position/Total Employees as of 10/15/2019 (excluding temps)**	**Original planned headcount (before Erlanger opened)**	**Revised planned final headcount (after Erlanger opened)**[21]
Hand stack material handler	4/4	4	6
Laborer	2/2	4	4
Logistics operator I	4/4	4	16
Logistics operator II	1/1	1	1
Logistics operator III	8/11	17	25
Logistics operator IV	1/1	2	2
Material handler	3/5	20	25
Vertique mechanic	0/2	2	2
Total	23/30	54	81

(Jt. Exh. 1 (pars. 13–15); GC Exh. 16 (pp. 1–2); R. Exh. 6; Tr. 112–113, 500–503; see also GC Exh. 41 (showing Erlanger employees' hours worked from October 14–19); Tr. 226–230 (discussing GC Exh. 41).)

As previously noted, Respondent used temporary employees to bridge any staffing gaps in its headcount (for startup purposes or in reference to its expected final headcount). For example, on about October 1, Respondent had 84 temporary employees working in the following positions: hand stack material handler (3 temporary employees); logistics operator I (32); logistics operator III (13); and material handler (36). (R. Exh. 6 (indicating that one additional temporary employee worked as a material handler lead); see also R. Exh. 16 (p. 1) (indicating that temporary employees worked 8073 hours at Erlanger in October 2019); Tr. 672–673 (discussing R. Exh. 16).)

[21] After the chaotic opening day(s) at Erlanger, Respondent determined that it should have had higher initial headcounts in the following positions to assist with the startup process (in addition to higher final headcounts): logistics operator I (36 employees for startup; 16 final); material handler (38 startup; 25 final). (R. Exh. 6; Tr. 502–503.)

P. Fall 2019: Developing Questions about Union Representation at Erlanger

1. Conditions at Erlanger

In about early November, manager Thomas Becker spoke to Lemarco Branham about the possibility of Branham applying for a job as a lead. During that conversation, Becker stated that management was a lot less stressful at Erlanger and that things ran a lot smoother without the Union. (Tr. 353, 380–381.)

Lemarco Branham also observed that work rules were more relaxed for employees at Erlanger than they were at Duck Creek. For example, Branham found that Respondent was less strict with attendance at Erlanger and was more accommodating with requests for time off. Branham also noted that Respondent was more flexible at Erlanger with allowing employees to use cell phones, Bluetooth speakers and headphones. (Tr. 351–352, 356–359.)

2. Employee petition

On around December 12, 2019, employees began circulating and signing a petition that stated as follows about union representation:

> The undersigned employees do NOT want to be represented by the IBT, Local 1199, do NOT want to join the Union, and do NOT support the Union in any manner. We ask our employer, Coca-Cola Bottling Company, to not voluntarily recognize or bargain with the Union in any manner.
>
> Should our employer ever voluntarily recognize the Union as the bargaining representative of employees, the undersigned employees hereby petition the National Labor Relations Board to hold a DECERTIFICATION ELECTION to determine whether the majority of employees truly wish to be represented by the Union

(R. Exh. 18.)

On about December 18, 2019, an employee delivered a copy of the petition to Cheney. Based on a visual inspection of the petition, Cheney believed the signatures on the petition to be authentic and forwarded a copy to Eblen. Of the 21 members of the Duck Creek bargaining unit who were working at Erlanger in non-administrative, non-supervisory positions at the time, 16 signed the petition. (R. Exh. 18; GC Exh. 16 (pp. 1, 11–12); Tr. 634–635, 639–640, 649, 657–666, 696–697, 724–729; see also Tr. 633–634, 729 (Cheney testimony that various former Duck Creek employees told him in fall 2019 that they "were glad that they were in Erlanger, and that they were happy to not be in Duck Creek and not be a part of the union environment that was over there").[22]

[22] I do not give weight to Cheney's testimony that he recalled having specific conversations in which 12–14 employees who signed the petition indicated they did not wish to be represented by the union. Cheney merely answered "Correct" to a closed question that Respondent's counsel posed and did not supply the specific content or dates of any of these conversations. (See Tr. 666–667.) I also do not give weight to Eblen's testimony that Respondent did not recognize the Union in part because Respondent "had already started hearing from [its] former Duck Creek teammates that they [] did not want to be

Q. Working Conditions and Staffing at Erlanger in January 2020

1. Staffing in January 2020

In January 2020, the number of employees in permanent positions at Erlanger increased, in part because some of the temporary employees who had been working at the facility accrued enough hours to apply for and receive permanent positions. The following chart illustrates how Respondent's staffing looked in this time period in proposed bargaining unit positions:

Job Title	**Former Duck Creek Employees in Position/Total Employees as of 1/20/2020 (excluding temps)**	**Original planned headcount (before Erlanger opened)**	**Revised planned final headcount (after Erlanger opened)**
Hand stack material handler	1/1	4	6
Laborer	2/2	4	4
Logistics operator I	4/5	4	16
Logistics operator II	1/1	1	1
Logistics operator III	9/20	17	25
Logistics operator IV	1/1	2	2
Material handler	3/13	20	25
Vertique mechanic	0/3	2	2
Total	21/46	54	81

(GC Exh. 16 (pp. 12, 16); R. Exh. 6; Tr. 670–671, 675–676, 718.) Notably, from January 6–20, 2020, Respondent hired 15 of the permanent employees in the positions noted above, 14 of whom began working at Erlanger as temporary employees in October 2019. (Compare GC Exh. 16 (p. 16) with R. Exh. 16 (p. 1).)[23]

Respondent continued to use temporary employees to bridge any gaps between the number of permanent employees working and the staff that Respondent needed in various non-administrative, non-supervisory positions. Turnover among temporary employees continued to be common in the early 2020 time period. (GC Exhs. 43 (pp. 7–9, 21–28), 44; R. Exh. 16 (pp. 4–5) (noting that temporary employees worked 7567 hours at Erlanger in January 2020); Tr. 265–266, 711–713.)

recognized [sic] by the Teamsters." (Tr. 507.) Eblen's testimony was far too vague to be of value, as she did not provide any detail about who she spoke with, when the conversation(s) occurred, or the number of employees who purportedly said that they did not want to be represented by the Union.

[23] The initials of the 14 former temporary employees are: E.dR.; J.G.; A.H.; R.H.; C.H.; B.L.; C.S.; D.T.; M.C.; M.D.; M.F.; K.H.; M.H.; and J.R.. (See GC Exh. 16 (p. 16); R. Exh. 16 (p. 1).)

2. Respondent increases order processing at Erlanger

In January 2020, Erlanger began handling beverage orders from Respondent's office in Portsmouth, Ohio. This development, which had been delayed from around October 2019, increased the annual number of beverage cases handled at Erlanger from 18 million (the number of cases previously handled at Duck Creek) to 21 million. Respondent did not necessarily increase its staffing at Erlanger due to the additional orders from Portsmouth; instead, Respondent was able to handle the additional orders because its staff was more familiar with the automated process and the number of orders from existing Erlanger customers was somewhat lower in early 2020. (Tr. 683–688, 817–823; R. Exh. 10 (showing monthly orders of beverage cases from customers of Erlanger and Portsmouth from October 2019 through February 2021).)

3. Respondent learns that it incorrectly disqualified four Duck Creek employees during hiring for Erlanger

Also in January 2020, Respondent reviewed its records and found that it erroneously disqualified the following four alleged discriminatees during the Erlanger hiring process: Chris Downs; David Gonzalez; Hector Montero; and Chris Valentine.[24] These four alleged discriminatees either did not have a step 3 or step 3 equivalent level of discipline, and/or had discipline that should not have been counted because it had expired and/or rolled off under Respondent's work rules and disciplinary policy at Duck Creek. Not wanting to look backwards, Respondent elected not to offer employment at Erlanger to Downs, Gonzalez, Montero and Valentine after learning that they were disqualified erroneously, and also elected not to rescind its decision to hire another former Duck Creek bargaining unit member who Respondent overlooked when identifying Erlanger applicants who would be disqualified for having a step 3 or step 3 equivalent level of discipline. (Jt. Exh. 1 (par. 9); Tr. 217, 519–520, 530–531, 626–631, 697–698, 709–710; see also Tr. 626–629 (explaining that the errors occurred in part because Respondent reviewed discipline in the August 26, 2018 to August 26, 2019 timeframe instead of the September 30, 2018 to September 30, 2019 timeframe, and in part because some discipline was mis-reported).)

R. Staffing at Erlanger in February 2021

The following chart illustrates how Respondent's staffing at Erlanger looked in February 2021 in proposed bargaining unit positions:

Job Title	**Former Duck Creek Employees in Position/Total Employees as of 2/29/2021 (excluding temps)**	**Original planned headcount (before Erlanger opened)**	**Revised planned final headcount (after Erlanger opened)**
Hand stack material handler	0/3	4	6
Laborer	3/4	4	4

[24] The evidentiary record does not establish why Respondent reviewed its hiring records at this point.

Logistics operator I	1/4	4	16
Logistics operator II	1/1	1	1
Logistics operator III	7/19	17	25
Logistics operator IV	2/3	2	2
Material handler	0/20	20	25
Vertique mechanic	1/3	2	2
Transition/Return to Work	0/1	n/a	n/a
Total	15/58	54	81

(GC Exh. 39 (p. 6); R. Exh. 6; see also GC Exh. 39 (pp. 2–5) (indicating the total number of employees in proposed bargaining unit positions on the following dates: March 30, 2020 (54 employees); June 30, 2020 (52); September 30, 2020 (56); and December 31, 2020 (59).)

As it had since opening the Erlanger facility, Respondent continued to use temporary employees to bridge any staffing gaps and continued to contend with turnover among temporary employees. (GC Exhs. 42 (pp. 1–15), 45; R. Exh. 16 (p. 18) (noting that temporary employees worked 1816 hours at Erlanger in February 2021); Tr. 257–258.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 860. My credibility findings are set forth above in the findings of fact for this decision.

B. Did Respondent Unlawfully Refuse to Hire 20 Duck Creek Bargaining Unit Members at the Erlanger Facility?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, in about September 2019, refusing to consider for hire or hire twenty applicants for employment at Respondent's Erlanger facility because those applicants engaged in union and protected concerted activities.

2. Applicable legal standard

To establish a discriminatory refusal to hire, the General Counsel must, as an initial matter, show that the alleged discriminatee was an applicant genuinely interested in becoming employed by the employer (such that protection as an employee under Section 2(3) is warranted). That showing has two components: there was an application for employment (which the General Counsel must prove); and the application reflected a genuine interest in becoming employed by the employer (which the employer must put at issue through evidence that creates a reasonable question about the applicant's actual interest in going to work for the employer). *Toering Electric Co.*, 351 NLRB 225, 233 (2007); see also *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 1 (2016), enfd. in pertinent part, 883 F.3d 725 (8th Cir. 2018).

If that initial hurdle is cleared, then the General Counsel must show (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered to such requirements, or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicant. Once those elements are established, the burden shifts to the employer to show that it would not have hired the applicant even in the absence of his or her union activity or affiliation. *FES*, 331 NLRB 9, 12 (2000); see also *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 1.

To establish a discriminatory refusal to consider for hire, by contrast, the General Counsel must show (1) that the employer excluded the applicant from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment. Once that is established, the burden shifts to the employer to show that it would not have considered the applicant even in the absence of his or her union activity or affiliation. *FES*, 331 NLRB at 15.

3. Analysis

The evidentiary record establishes that on about August 14, 2019, Respondent began hiring for positions at a new, automated warehouse that it planned to open in Erlanger, Kentucky. Respondent gave internal applicants, including bargaining unit members working in the Duck Creek warehouse, the first opportunity to apply for positions at Erlanger. In connection with that approach, Respondent held a job fair on August 20–22, 2019, to enable Duck Creek employees to submit applications and interview for Erlanger positions. For most Erlanger positions, Respondent did not accept applications from external applicants until August 26. (FOF, Section II(I).)

After receiving applications from internal candidates, Respondent reviewed their disciplinary histories and disqualified any internal candidates (union-represented or not) who had a step 3 or step 3 equivalent level of discipline under Respondent's standard disciplinary policy. The practice of disqualifying internal applicants who were at a step 3 level of discipline was not new, as Respondent had that rule in place since 2007. Since Duck Creek employees were under a different disciplinary framework, however, Respondent disqualified Duck Creek employees who had active discipline that was equivalent to step 3 discipline under the standard disciplinary policy. Through this process, Respondent decided not to hire 20 Duck Creek bargaining unit

members at Erlanger. Respondent did not review the disciplinary histories of any external applicants, and thus did not refuse to hire any external applicants on that basis. Ultimately, Respondent offered positions at Erlanger to 38 Duck Creek bargaining unit members (out of 77 bargaining unit members who submitted applications), 25 of whom accepted the offers.[25] (FOF, Section II(J), (L) (noting that of the 77 bargaining unit applicants, 19 were disqualified for reasons not at issue here, such as subsequently being terminated from their employment at Duck Creek or failing to do a job interview).)

At the outset, I note that several issues are not in dispute. It is clear that Respondent was hiring for positions at Erlanger in August/September 2019. Further, each of the alleged discriminatees applied to work at Erlanger and had a genuine interest in working at the facility (no evidence to the contrary was presented), and had experience/training relevant to the positions at Erlanger based on their work in the Duck Creek warehouse. The parties disagree, however, about whether Respondent's decision to disqualify internal applicants who had a step 3 or step 3 equivalent level of discipline was permissible as a result of a neutral and uniformly applied criterion for hire, or instead was unlawfully motivated by antiunion animus. See *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44 (2003) (noting that it is a legitimate employment practice to make hiring decisions based on uniformly applied neutral hiring policies).

Based on the record before me, I do not find that Respondent's hiring practices at Erlanger were motivated by antiunion animus or otherwise designed/implemented in a discriminatory manner to disqualify applicants who were members of the Duck Creek bargaining unit. First, Respondent was following an established rule when it disqualified internal applicants who had either a step 3 or step 3 equivalent level of discipline. The step 3 discipline rule has been in place since at least 2007. To the extent that Respondent had to account for Duck Creek's different disciplinary framework by assessing which employees had a step 3 equivalent level of discipline, I find that Respondent followed a reasonable (if imperfect) process that applied to both union-represented and nonunion-represented internal applicants who sought positions at Erlanger. (FOF, Section II(I)(1), (J)(2).)

Second, Duck Creek bargaining unit members comprised a majority of the employees that Respondent hired to work at Erlanger in proposed bargaining unit positions. Indeed, as of October 15, 2019, Duck Creek bargaining unit members held 23 of these positions at Erlanger, as compared to 6 positions held by external applicants and 1 position held by an internal, nonunion candidate (employee Q.D.). (FOF, Section II(P)(3).) This is not, therefore, a case where Respondent's hiring criteria resulted in a low percentage of union-represented employees being selected for permanent positions at Erlanger. Compare *Kessel Food Markets*, 287 NLRB 426, 429 & fn. 15 (1987) (finding an adequate business justification for the employer to consider manager evaluations of union-represented former employee applicants as part of the employer's hiring process, particularly where that criterion did not have the effect of disqualifying most of those former employee applicants), enfd. 868 F.2d 881 (6th Cir. 1989) with *Spencer Foods*, 268 NLRB 1483, 1485–1486 (1984) (finding that an employer's hiring practices were discriminatory in part because the employer used an anti-nepotism rule that it did not apply consistently and that

[25] Two (2) of the 25 internal applicants accepted material handler lead positions, which Respondent contends are supervisory positions. (FOF, Section II(L).) I take no position on whether the material handler lead position is a supervisory one, as that issue is not material to my analysis.

disqualified approximately half of former employees who were union-represented), affirmed in pertinent part, 768 F.2d 1463 (D.C. Cir. 1985).

Third, the evidentiary record lacks any other meaningful evidence that would suggest that Respondent acted with antiunion animus when hiring at Erlanger. There is no evidence that any of Respondent's decisionmakers in the hiring process harbored animus against union-represented applicants or were involved in handling grievances, unfair labor practice charges or other matters raised by the Union. To the extent that any of Respondent's managers expressed frustration with the Union (e.g., Hadam, Boland and Becker), their comments were remote in time to the hiring process and in any event do not rise to the level of suggesting that Respondent acted with an intent to prevent union-represented employees from working at Erlanger.[26] In fact, Respondent took steps to encourage its employees to apply to work at Erlanger, including holding job fairs to assist employees with submitting applications, conducting interviews at the job fairs (thereby making them more accessible), waiving the supervisor endorsement and minimum time-in-position requirements, and permitting internal applicants to apply for multiple positions. (See FOF, Section II(A)(4), (I)(1), (Q)(1).) Compare *Monfort of Colorado*, 298 NLRB 73, 79–83 (1990) (finding that the employer discriminated against former, union-represented employees because, among other things, the evidence showed that the employer was hostile to the former employees' union activities and used prior employment history in markedly disparate ways when evaluating former employee applicants vs. other applicants), enfd. in pertinent part, 965 F.2d 1538 (10th Cir. 1992).

Fourth, I do not find that Respondent's post-hiring decisions at Erlanger indicate that Respondent acted with antiunion animus. The General Counsel faults Respondent for: not hiring the alleged discriminatees at Erlanger once Respondent learned, in early October 2019, that its estimated staffing needs for Erlanger were too low; not permitting two alleged discriminatees to work at Erlanger as temporary employees in October 2019; and, in January 2020, not offering positions to alleged discriminatees Chris Downs, David Gonzalez, Hector Montero and Chris Valentine when Respondent determined that it erroneously identified them as having step 3 equivalent levels of discipline. (GC Posttrial Br. at 24–25.) I find that Respondent's October 2019 decisions were permissible, as it was reasonable for Respondent to stand by its prior decisions to disqualify the alleged discriminatees from working at Erlanger based on their disciplinary histories as Respondent understood them at the time. I also find that Respondent's January 2020 decision to move forward without offering Erlanger positions to Downs, Gonzalez, Montero and Valentine was permissible. While it is apparent that those 4 alleged discriminatees got a proverbial raw deal when Respondent erroneously disqualified them from being offered positions at Erlanger, it does not follow that Respondent acted with antiunion animus when it

[26] Although I credited Lemarco Branham's testimony that Janko (Mandakovic) said that Erlanger would be nonunion (in September 2019, when Branham learned he would be offered a position at Erlanger), I do not give significant weight to that incident in evaluating whether Respondent acted with antiunion animus during Erlanger hiring. (FOF, Section II(L).) There is no evidence that Mandakovic was directly involved in Respondent's hiring decisions at Erlanger, and in any event his solitary remark falls well short of demonstrating that Respondent acted with a discriminatory motive when hiring for positions at Erlanger. See *Kessel Food Markets*, 287 NLRB at 429–430 & fn. 12 (finding that employer did not discriminate against former, union-represented employees in its hiring decisions for its store in Flint, Michigan, notwithstanding statements by the store owner and other managers that the store would be nonunion).

made those erroneous decisions or when it decided not to correct the errors and belatedly make employment offers. By January 2020, Respondent was hiring permanent employees at Erlanger who successfully completed its temp-to-hire program. I do not have a basis for finding that it was improper for Respondent to proceed with that hiring pathway and not look backwards towards employees that it may have missed in its September 2019 hires. (See FOF, Section II(R)(1) (noting that Respondent hired 15 permanent employees at Erlanger between January 6–20, 2020, 14 of whom began working at Erlanger in October 2019 as temporary employees).)[27]

Since the General Counsel failed to show that Respondent acted with antiunion animus in its September 2019 Erlanger hiring decisions, the General Counsel cannot show that Respondent violated the Act by refusing to hire, or consider for hire, the 20 alleged discriminatees because of their union and protected concerted activities. Accordingly, I recommend dismissal of the complaint allegations that Respondent violated Section 8(a)(3) and (1) of the Act with its September 2019 Erlanger hiring decisions.

C. Did Respondent Unlawfully Fail and Refuse to Recognize and Bargain with the Union at the Erlanger Facility?

1. Complaint allegations

The General Counsel alleges that since about October 14, 2019, Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the proposed bargaining unit at Erlanger.

2. Applicable legal standard

When an employer transfers a portion of its employees at one location to a new location, the Board begins with the long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming that the presumption is not rebutted, the Board applies a simple fact-based majority test to determine whether the employer is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, the Board will presume that those employees continue to support the union and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit. *Gitano Distribution Center*, 308 NLRB 1172, 1175 & fn. 20 (1992) (indicating that this standard applies not only to employee transfers to a new location but also to hires at the new location).

[27] The General Counsel also faults Respondent for not requiring Crown Services to review the disciplinary histories of temporary employees that it sent to Erlanger, maintaining that this practice suggests that Respondent acted with antiunion animus when it disqualified the alleged discriminatees based on their disciplinary histories. (See GC Posttrial Br. at 21–22.) I am not persuaded by the General Counsel's argument. While Respondent may have had limited screening criteria for temporary employees, Respondent did not hesitate to remove any temporary employees who did not meet its standards after they started at Erlanger. Temporary employees were therefore on different footing altogether than permanent employees (or applicants for such positions), as they had an easy path for placement at Erlanger, but also an easy path for removal if they did not perform to Respondent's standards. (See FOF, Section II(O)(3), (R)(1), (S).)

Drawing from precedent established in the successor employer context, I find that in a "partial relocation" case such as this one, an employer's obligation to recognize and bargain with the union matures when: (1) the employer has hired a substantial and representative complement of employees, a majority of whom were represented by the union at the previous location; and (2) the union has made an effective demand for recognition and bargaining. In some instances, the obligation to bargain begins immediately, because the employer immediately begins providing a full range of operations and a majority of employees in the proposed bargaining unit are represented by the union. By contrast, when an employer gradually builds its operations and hires employees during an initial startup period, the Board does not evaluate whether the employer has an obligation to bargain until the employer has hired a substantial and representative complement of its work force. To decide whether a substantial and representative complement exists, the Board considers: whether the job classifications designated for the operation were filled or substantially filled; whether the operation was in normal or substantially normal production; the size of the complement on that date; and the time expected before a substantially larger complement would be at work, as well as the relative certainty of the employer's expected expansion. Cf. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 46–49 (1987) (discussing these standards in the successor employer context); *MSK Corp.*, 341 NLRB 43, 44–45 (2004) (same, and noting that the "substantial and representative complement" and "demand for recognition" conditions need not occur in any particular order because a union's premature bargaining demand is deemed to be a continuing demand until the bargaining obligation matures); *Myers Custom Products*, 278 NLRB 636, 637 (1986) (same, explaining that in deciding whether a substantial and representative work force existed on a certain date, the Board must balance the objective of selection of a bargaining representative by the maximum number of employees with the objective of employee representation as soon as possible, and noting that when a new employer expects, with reasonable certainty, to increase its employee complement substantially within a relatively short time, it is appropriate to delay determining the bargaining obligation for that short period).

3. Analysis

The evidentiary record establishes that on October 3, 2019, the Union requested recognition and bargaining on behalf of the proposed Erlanger bargaining unit (a unit that the parties agree is separate from the Duck Creek unit). The General Counsel maintains that the bargaining obligation matured in the week of October 14, 2019, when Respondent had 30 permanent employees working in proposed bargaining unit positions, 23 of whom were previously members of the Duck Creek unit. On October 23, 2019, however, Respondent declined the Union's request for recognition and bargaining, maintaining that the request was premature and also questioning whether the Union had majority status. (FOF, Section II(P); see also GC Posttrial Br. at 29.)

Respondent asserts that the Union's bargaining demand was premature because in October 2019, Respondent had not yet hired a substantial and representative complement of employees. In particular, Respondent maintains that it had definite plans to expand its workforce due to the revised staffing projections made after Erlanger opened, and that operations at Erlanger were not normal or substantially normal until January 2020, when Respondent added the customer orders from Portsmouth, Ohio to Erlanger's order processing load. Respondent

further maintains that by January 2020, it had a good faith doubt that the Union lacked majority status, such that it could lawfully refuse the Union's recognition and bargaining demand. (R. Posttrial Br. at 27–33.)

I am not persuaded by Respondent's arguments. First, I find that Respondent did employ a substantial and representative complement of employees in the proposed Erlanger bargaining unit Erlanger by October 15, 2019. Erlanger operations were substantially normal, if not fully normal, by that date, as demonstrated by the fact that the Erlanger facility immediately began handling the full slate of customer orders previously handled at Duck Creek (18 million beverage cases annually). To be sure, Erlanger added an additional volume of customer orders in January 2020 when it began processing customer orders from Portsmouth, Ohio (3 million beverage cases annually), but that only illustrates that Erlanger started off handling nearly 86 percent (18/21 million) of its expected annual number of beverage cases when it opened. (FOF, Section II(O)(1), (R)(2).) Further, by October 15, Respondent had 30 permanent employees working in all job classifications in the proposed Erlanger bargaining unit. While Respondent did revise its Erlanger staffing estimates in those positions from 54 to 81 employees (after a chaotic start to operations as employees learned their new jobs), there was no specific timetable or plan for actually hiring additional permanent employees within a relatively short time. Instead, Respondent consistently relied on temporary employees to shore up its staffing needs and has never come close to having 81 employees in proposed bargaining unit positions (instead hovering in the range of 52–59 employees in 2020 and early 2021). (FOF, Section II(O)(3), (P)(3), (R)(1), (S).) Because of the uncertainty surrounding Respondent's plans to expand its workforce at Erlanger, it was not appropriate to delay determining Respondent's bargaining obligations on that basis.[28] *M.U. Industries*, 284 NLRB 388, 388–389 (1987) (finding that the employer's plan to expand its work force to 30 or 40 employees was too speculative to justify a conclusion that the employer did not have a substantial and representative complement of employees when the Union demanded recognition).

Second, I find that Respondent did not rebut the presumption that the 23 former Duck Creek warehouse bargaining unit employees working at Erlanger in proposed bargaining unit positions continued to support the Union as of October 15, 2019, when the Union's demand for recognition and bargaining at Erlanger matured. See *Gitano Distribution Center*, 308 NLRB at 1175; see also FOF, Section II(P)(3) (showing that 23 out of 30 employees working at Erlanger in the proposed bargaining unit were former Duck Creek bargaining unit members). As of that date, Respondent's evidence of employee disaffection with the Union was limited to Cheney's conversations with former Duck Creek employees who were working at Erlanger. Cheney's

[28] A deeper dive into the numbers supports the conclusion that Respondent had a substantial and representative complement of employees working at Erlanger by October 15, 2019. As of October 15, 2019, Respondent employed permanent employees in more than half of its full complement of 52–59 proposed bargaining unit positions (i.e., 30/59 = 50.8 percent) and across all job classifications in the proposed unit. Even if we were to use Respondent's preferred number of 81 expected permanent employees, the percentage (30/81 = 37 percent, with all job classifications filled) would still exceed what the Board generally deems to be a substantial and representative complement of employees. See *Shares, Inc.*, 343 NLRB 455, 455 fn. 2 (2004) (noting that "[i]n general, the Board finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications"), enfd. 433 F.3d 939 (7th Cir. 2006); *MJM Studios*, 336 NLRB 1255, 1256 (2001) (same).

testimony about those conversations was far too vague for me (or Respondent) to rely on them as objective evidence that the Union lost majority status, as Cheney did not: provide the dates of the various conversations (or any clarity regarding whether the conversations happened before or after October 15); or describe any specific employee remarks that would clearly show disaffection for the Union.[29] See *MSK Corp.*, 341 NLRB at 46–48 (giving little weight to aspects of the employer's evidence that employees opposed union representation, citing, among other deficiencies, the lack of clarity about the content of employee remarks about the union and evidence that some of the employee remarks were made after the employer's bargaining obligation matured); see also FOF, Section II(Q)(2). While Respondent subsequently did, on about December 18, 2019, receive a petition from 16 employees that arguably shows disaffection for the Union (see FOF, Section II(Q)(2)), that petition carries little weight here because Respondent received the petition well after the Union's demand for recognition and bargaining matured on October 15, 2019.

In sum, I find that Respondent was obligated to recognize and bargain with the Union on October 15, 2019, as the exclusive collective-bargaining representative of employees in the proposed bargaining unit at Erlanger. Respondent had hired a substantial and representative complement of employees in the proposed bargaining unit by that date, and a majority of employees (23/30) in the proposed unit were represented by the Union. Accordingly, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union since October 15, 2019.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, since about October 15, 2019, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act:

> All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined

[29] Cheney only testified that "a majority" of employees he spoke to after Erlanger opened said "they were glad that they were in Erlanger, and that they were happy to not be in Duck Creek and not be a part of the union environment that was over there." (Tr. 633–634.) That testimony arguably describes an employee preference for working at Erlanger but falls short of showing employee disaffection with the Union altogether.

by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

4. The unfair labor practices stated in conclusion of law 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union, I find that an affirmative bargaining order is warranted based on the facts of this case.

The Board has previously held that an affirmative bargaining order is the traditional, appropriate remedy for a Section 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. *Caterair International*, 322 NLRB 64, 68 (1996). However, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–739 (D.C. Cir. 2000). In *Vincent*, supra at 738, the court stated that an affirmative bargaining order must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representative; and (3) whether alternative remedies are adequate to remedy the violations of the Act. Although the Board has indicated that it disagrees with the requirements that the court identified in *Vincent*, the Board has followed a practice of examining whether an affirmative bargaining order is justified according to the standard set forth in *Vincent.* See, e.g., *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150, slip op. at 10–11 (2019), enfd. 836 Fed. Appx. 1 (D.C. Cir. 2020).

Following the Board's approach, I have analyzed the facts of this case under the three-factor balancing test outlined by the U.S. Court of Appeals for the District of Columbia Circuit.

(1) An affirmative bargaining order in this case will vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representative by Respondent's refusal to recognize and bargain with the Union. An affirmative bargaining order, with its attendant bar to raising a question concerning the Union's majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was unfairly deprived of an opportunity to represent members of the Erlanger bargaining unit for nearly two years (from October 15, 2019 to the present), it is only by restoring the status quo ante and requiring Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative free of

Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective-bargaining and industrial peace. It removes Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

(3) A cease-and-desist order alone would be inadequate to remedy Respondent's refusal to recognize and bargain with the Union because it would permit another challenge to the Union's majority status before the taint of Respondent's previous refusal to recognize and bargain with the Union has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unjust in circumstances such as those here, where given the passage of time since Respondent refused recognition the Union needs to reestablish (or establish in the first instance for employees who are new to being represented) its representative status with unit employees. Further, Respondent's refusal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. In such circumstances, permitting a decertification petition to be filed immediately might very well allow Respondent to profit from its own unlawful conduct. I find that those circumstances outweigh the temporary impact that the affirmative bargaining order will have on the rights of employees who oppose union representation.

For all of the foregoing reasons, I find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case, and I shall include such an order as a remedy here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent, Coca-Cola Consolidated, Inc., Erlanger, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to recognize and bargain with the International Brotherhood of Teamsters (IBT), Local Union No. 1199, as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively for a reasonable period of time with the International Brotherhood of Teamsters (IBT), Local Union No. 1199, as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

(b) Within 14 days after service by the Region, post at its facility in Erlanger, Kentucky,[31] a copy of the attached notice marked "Appendix."[32] Copies of the notice, on forms

[31] The General Counsel also requested that I require Respondent to post a copy of the notice at its Cincinnati, Ohio (Duck Creek) facility. (See GC Posttrial Br. at 36–37.) I decline that request since the violation that I have found relates solely to Respondent's Erlanger, Kentucky facility.

[32] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic

provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 15, 2021.

Geoffrey Carter
Administrative Law Judge

distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the International Brotherhood of Teamsters (IBT), Local Union No. 1199, as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain collectively for a reasonable period of time with the International Brotherhood of Teamsters (IBT), Local Union No. 1199, as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees in warehouse and maintenance positions at the Employer's facility at 680 Erlanger Road in Erlanger, Kentucky, including hand stack material handlers, forklift operators, laborer[s], logistic operators, switchers, warehouse custodians, automated warehouse material handlers and automation mechanics but excluding checkers, administrators, driver-merchandisers, cooler delivery employees, over-the-road drivers, refrigeration and vending service employees, office and clerical

employees, guards, sales employees, professional employees and supervisors, as defined by the National Labor Relations Act, as amended, and all other employees of the Employer at the Erlanger Road location.

COCA-COLA CONSOLIDATED, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-250571 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.